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No. 98-1138

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term 1998

## MICHAEL A. SCOTT,

*Petitioner,*

v.

## NORFOLK SOUTHERN CORPORATION, et. al.,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA**

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the District Court erred in dismissing Scott's § 1981 claim from the Third Amended Complaint based upon the two year statute of limitations.

II. Whether the District Court erred in refusing to permit Scott to assert a Title VII claim for racially motivated transfer and a Title VII claim for retaliatory discharge.

## PARTIES TO THE PROCEEDING

Plaintiff in the District Court:

Michael A. Scott

Defendants in the District Court:

Norfolk Southern Corporation
David R. Goode
Stephen C. Tobias
Donald W. Mayberry
Jon L. Manetta
William E. Honeycutt
C. David Vittur
Donald D. Graab
Artis L. Luttrell
Timothy A. Heilig
Lewis D. Hale
Jerry R. Gray
Wayne F. Henley
Jeff E. Pair
Jerry W. Clemmer

Norfolk Southern Corporation owns the common stock of Norfolk Southern Railway Company. The non-wholly-owned subsidiaries of Norfolk Southern Railway Company which may be publicly owned are:

High Point, Randleman, Asheboro and Southern Railroad Company; Mobile and Birmingham Railroad Company; North Carolina Midland Railroad Company; The South Western Railroad Company; The State University Railroad Company; Yadkin Railroad Company

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## STATUTORY PROVISIONS INVOLVED IN THE CASE

Petitioner has set out the text of the following statutory provisions:

42 U.S.C. § 1981
42 U.S.C. § 2000e (Title VII)
Fed. R. Civ. P. 8(f)
Fed. R. Civ. P. 10(c)

Respondents set out the text of the following statutory provisions:

Supreme Court Rule 10.

Considerations Governing Review on Certiorari. Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Virginia Code §8.01-243.A (Michie 1992).

Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## COUNTER-STATEMENT OF CASE

Contrary to Petitioner's Statement of the Case, the Petition for Writ of Certiorari presents two fundamental issues:

(a) Whether petitioner may hide behind his pro se status, given his extensive litigation history;

(b) Whether petitioner may use his pro se status to assert error as a result of the District Court's alleged failure to examine the EEOC charge and affidavit appended as exhibits to his various amended complaints without examining the amended complaints as a whole.

Petitioner, a disgruntled former management employee of Norfolk Southern Corporation ("NS"), asks this Court to grant review of a case in which the jury rendered defense verdicts on claims of racially motivated discharge and racial harassment, sustained on appeal by the Fourth Circuit, and in which the Fourth Circuit remanded the same-gender sexual harassment retaliatory transfer claim [1]. Scott bases his

[1]The District Court had dismissed Scott's claim for retaliatory transfer based upon his January, 1995 same-gender sexual harassment EEOC charge on the ground that, under the Fourth Circuit precedent, his underlying same-gender sexual harassment claim was not cognizable under Title VII. Since then, this Court decided Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). The Fourth Circuit remanded the retaliatory transfer claim based upon the underlying same-gender

Petition on the generalized allegations of discrimination in the EEOC charge (and affidavit), taken out of the context of his Third Amended Complaint and Fifth Amended Complaint. Significantly, Scott omitted both the Third Amended Complaint and the Fifth Amended Complaint from Petitioner's Appendix, attaching only the EEOC charge and affidavit.[2] Scott's recitation of the procedural history omits and confuses many facts, so respondents restate it.

A. Third Amended Complaint and § 1981 Claim

On March 11, 1996, Scott filed his initial Complaint in this case[3] seeking class certification, $4,000,000.00 compensatory damages, $8,000,000.00 punitive damages and both injunctive and declaratory relief. (Respondents' Appendix B). This case was the fifth of ten lawsuits initiated by Scott since April, 1995 (his third of seven lawsuits as a pro se plaintiff). (Respondents' Appendix A). Scott sued NS and fourteen managers and supervisors, ranging from his former immediate supervisor, Jerry W. Clemmer, to the Chairman and Chief Executive Officer of the corporation. Before defendants had responded, Scott filed a Motion to Amend and Second Amended Complaint (which was permitted as a matter of right, Fed. R. Civ. P. 15(a) and then a Motion to Amend and Third Amended Complaint, which

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sexual harassment charge to the District Court for further proceedings. Defendant has again moved to dismiss the same-gender sexual harassment retaliatory discharge claim because the transfer was cancelled, so no adverse employment action occurred.

[2]Respondents include in their Appendix the full amended complaints with complete attachments, as well as other pertinent exhibits not included in Petitioner's Appendix. Respondents also adopt Petitioner's Appendix A, B,C, and D.

[3]The Complaint, containing 24 counts, consisted of 72 pages and 236 numbered paragraphs.

became operative by District Court Order on May 2, 1996. The Third Amended Complaint[4] sought $4,000,000.00 compensatory damages, $8,000,000.00 punitive damages, and declaratory and injunctive relief. (Respondents' Appendix B). Scott attached eight exhibits to the Third Amended Complaint, including both his March 6, 1996 EEOC charge (Ex. F) and accompanying EEOC affidavit (Ex. G). The defendants filed a motion to dismiss (Respondents' Appendix C) pursuant to Rule 12(b)(6), Fed. R. Civ. P. 12(b)(6), claiming specifically that Scott's § 1981 allegations and claim were barred by the applicable two-year statute of limitations. Va. Code §8.01-243.A (Michie 1992). The defendants asserted that the § 1981 race discrimination allegations in paragraphs 1 through 118, Counts 2 and 3, of the Third Amended Complaint, all occurred more than two years prior to March 11, 1996. The District Court sustained defendants' motion and dismissed the § 1981 claim as being barred by the statute of limitations. At the hearing on defendants' motion to dismiss, the District Court also granted Scott leave to file a Fifth Amended Complaint and instructed him to plead with particularity and specificity the nature of his claims. (Respondents' Appendix H, I). The only issue facing this Court is whether the District Court wholly ignored the general statement in the EEOC charge in light of the very specific allegations of the Third Amended Complaint, in derogation of Rule 10(c), Fed. R. Civ. P. 10(c).

B. Operative Fifth Amended Complaint, Retaliatory Transfer, Racial Discharge

Pursuant to the District Court's August 14, 1996 judgment, opinion and order (Petitioner's Appendix C), Scott filed his Fifth Amended Complaint (Respondents' Appendix

[4]32 counts, 52 pages, 236 numbered paragraphs

D) on August 16, 1996.[5] Unlike the Third Amended Complaint, Scott attached as an exhibit only his EEOC charge (Ex. A.)[6], which contained the general allegation that he was "harassed, transferred and discharged because of my race . . . and as an act of retaliation . . . ." Count 1 of the Fifth Amended Complaint contains two parts: (1) "Title VII - Racial Discrimination," consisting of paragraphs 8 through 32; (2) "Title VII - Retaliation for Previous EEOC Charge," consisting of paragraphs 33 and 34. Based upon the detailed allegations contained in the body of the Fifth Amended Complaint, the District Court restricted Scott to a same-gender sexual harassment retaliation claim based solely upon his transfer, and a racial discrimination claim based upon alleged racial harassment and his discharge on February 16, 1996 (Respondents' Appendix I).

Following denial of defendants' motion to dismiss and for summary judgment (Respondents' Appendix E; Petitioner's Appendix D), the racial harassment and racial discharge claims were tried to a jury in late March and early April, 1997, resulting in a verdict in favor of NS on both claims. (Respondents' Appendix G). At a motion in limine hearing held prior to trial, the District Court dismissed the retaliatory transfer claim based upon Fourth Circuit authority that has since been overruled by this Court in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); the Fourth Circuit has remanded the retaliatory transfer claim to the District Court for further proceedings. Therefore, the only issue facing this Court is whether this Court can

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[5]The Fifth Amended Complaint, consisting of 25 pages, 8 counts, and 74 numbered paragraphs, sought $4,000,000.00 compensatory damages, $8,000,000.00 punitive damages, plus class and individual declaratory and injunctive relief. The District Court denied any class action relief.

[6]Contrary to Petitioner's assertion, he did not attach his EEOC affidavit as an exhibit to the Fifth Amended Complaint.

conclude from the record that the District Court ignored the EEOC charge.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I. Petitioner's Reliance Upon His Pro Se Status Is Disingenuous

The Petition for Certiorari asserts that, because Scott is a pro se plaintiff, his pleadings are entitled to liberal construction under the holdings of this Court. Given Scott's litigation history (Respondents' Appendix A) and the very voluminous and detailed allegations of both his Third Amended Complaint and Fifth Amended Complaint, Scott's reliance upon his pro se status is not consistent with this Court's liberal pleading standards.

Courts construing this Court's pro se liberal pleading rules have refused to apply those standards to experienced and prolific pro se litigators. See, e.g., Chapman v. Ontra, Inc., No. 96-C-0019, 1997 U.S. Dist. LEXIS 883 (N.D. Ill. June 7, 1997); Ward v. City of Prarie Village, No. 94-4138-SAC, 1995 U.S. Dist. LEXIS 16410 (D. Kan. Sept. 29, 1995). Scott proclaimed himself an "experienced pro se litigator" (Respondents' Appendix F) almost one month before he filed his Complaint, after which he had five opportunities to amend the Complaint. Under even the liberal standards of Haines v. Kerner, 404 U.S. 519 (1972), the District Court gave Scott every benefit of interpretation.

Petitioner intentionally omits from his Appendix the bodies of both the Third Amended Complaint and the Fifth Amended Complaint and now incants the general mantra of his EEOC charge - that he was "harassed, transferred and discharged because of my race . . . and as an act of retaliation [for filing a January, 1995, same-gender sexual harassment charge]." In relying upon that general allegation, Scott asks this Court to ignore the very detailed and specific allegations

in both the Third Amended Complaint and Fifth Amended Complaint.

For instance, granting Scott a liberal reading of the Third Amended Complaint, the race discrimination allegations are found in paragraphs 15, 16, 22, 24, 25, 27, 31, 34-37, 39-42 and 61-65. The dates involving those extensive and specific race discrimination allegations fall more than two years before March 11, 1996. Petitioner is hiding behind his pro se status and relying upon a general string of verbs in one sentence of his EEOC charge, compared to 118 factually detailed numbered paragraphs of allegations. The District Court's reliance upon both the body and exhibits of the Third Amended Complaint accords with Rule 10(c) and does not conflict with this Court's holdings construing pleadings of pro se litigants.

Likewise, while shorter, Scott's Fifth Amended Complaint is even more pointed and belies his pro se status. Count 1 of the Fifth Amended Complaint consists of two parts. The first part, entitled "Title VII - Racial Discrimination", includes specific factual allegations in paragraphs 8 through 32, all of which are related to racial harassment and racially motivated termination. In detailed contrast, the second part of Count 1, entitled "Title VII - Retaliation for Previous EEOC Charge", consisting of paragraphs 33 and 34, specifically refers to Scott's proposed transfer from Norfolk, Virginia to Decatur, Illinois, as retaliation for having filed a Title VII same-gender sexual harassment charge with the EEOC on January 27, 1995. While the March, 1996 EEOC charge containing the general mantra of "harassment, transfer, and termination based upon his race and in retaliation" is appended to the Fifth Amended Complaint, the "experienced pro se litigator" (Respondents' Appendix F) took great pains in the body of the Fifth Amended Complaint to differentiate between his Title VII race discrimination claim and his Title VII retaliation for same-gender sexual harassment claim. Having taken those

great and specific pains to differentiate between the two, petitioner may not now hide behind his pro se status.

## II. The District Court's Dismissal of the §1981 Claim After the Third Amended Complaint as Not Erroneous.

Petitioner knowingly and glaringly omitted from his appendix the body of the Third Amended Complaint, which contained the factual allegations necessary to the resolution of the § 1981 claim. A reading of the body of the Third Amended Complaint discloses racial discrimination allegations in paragraphs 15, 16, 22, 24, 25, 27, 31, 34-37, 39-43, and 61-65, all of which cover dates prior to March 11, 1994, the cut-off date for the § 1981 statute of limitations. No other race discrimination allegations exist other than the general statement from his EEOC charge. In contrast, he also makes specific allegations of retaliation for having filed a same-gender sexual harassment claim in paragraphs 67-78, 81-84, 90, 91, 93, 106 and 111-116 (especially paragraph 116) of his Third Amended Complaint. Therefore, notwithstanding the general statement in his March 1996 EEOC charge and affidavit, the numerous detailed allegations of the Third Amended Complaint disclose no race discrimination that would fall within the § 1981 statute of limitations. See Williams v. Norfolk & W. Ry., 530 F.2d 539, 541 (4th Cir. 1975); Bradley v. Carydale Enterprises, 707 F. Supp. 217, 220 n.8 (E.D. Va. 1989). The District Court did not err in dismissing plaintiff's § 1981 claim.

Petitioner carefully points to paragraphs 66 and 68-70 (Petition, p. 6) of the Third Amended Complaint as supporting his § 1981 claim based on the EEOC charges verbal string. Yet, paragraph 66 contains only factual allegations concerning Scott's same-gender sexual harassment complaints to "white" supervisors; paragraph 68 contains no racial discrimination allegations. Stripped of

their invective, paragraphs 69 and 70 contain allegations against W. F. Henley of making (death) threats against Scott.

> in reaction to the plaintiff's complaints made for sexual harassment and the Federal EEOC Complaint and the civil action filed pursuant to the Federal EEOC Complaint by plaintiff.

(Respondents' Appendix B, ¶ 66, 68-70). His reliance on paragraphs 69-78, 90-93, and 103-106 is likewise misplaced. Again, stripped of admittedly racial invective, paragraphs 69-78 accuse various supervisors of taking allegedly adverse employment actions "in reaction to" Scott's same-gender sexual harassment EEOC charge and resulting lawsuit. Paragraphs 90-93 contain none of the racial invective chanted in paragraphs 69-78, and refer specifically to Scott's transfer from Norfolk to Decatur as being "retaliatory in reaction to" his same-gender sexual harassment EEOC charge and lawsuit. (Respondents' Appendix B, ¶ 90-93). Likewise, paragraphs 103-106, referring to surveillance and Scott's termination, contain no allegations of racial discrimination. (Respondents' Appendix B, ¶ 103-106). Petitioner can only speculate that the District Court violated the tenets of Rule 10(c) given the specific allegations in the body of the Third Amended Complaint.

## III. Jury Verdicts on Racial Harassment and Racial Termination Preclude Relitigation of the § 1981 Claims.

Scott's Title VII racial discrimination claims based on allegations of racial harassment and racial termination were submitted to the jury and verdicts were returned in favor of NS. (Respondents' Appendix G). The elements of the required prima facie case under Title VII are the same as those under § 1981, and the Title VII and § 1981 proof schemes are identical. Patterson v. McClain Credit Union,

491 U.S. 164, 186 (1989); Gairola v. Comm'r. of Virginia Dept. of Gen. Serv., 753 F.2d 1281, 1285 (4th Cir. 1985). See also Durham v. Xerox Corp. 18 F.3d 836, 839 (10th Cir. 1994); Grano v. Dept. of Development, 637 F.2d 1073, 1082 (6th Cir. 1980). The jury verdicts on the Title VII racial harassment issues are dispositive of Scott's § 1981 racial discrimination claims, rendering any alleged error by the District Court harmless. "When a trial court's findings of fact [now a jury verdict] in a fully litigated Title VII claim are dispositive of the claimant's previously dismissed legal claims, any error in the dismissal of those claims has been rendered harmless." Spencer v. General Electric Company, 894 F.2d 651, 656 (4th Cir. 1990); see also Blyer v. Smith, 867 F.2d 184, 192-93 (4th Cir. 1989). Because the jury found no racially discriminatory actions or intent by NS under the Title VII claim, it likewise could find none under §1981. Grano, supra, 637 F.2d at 1082.

## IV. The District Court Properly Limited Scott's Claim Regarding His Discharge to Race, Not Retaliation, and Properly Limited Scott's Claim Regarding His Transfer to Same-Gender Sexual Harassment Retaliation, Not Race.

Scott readily admits that the District Court permitted him to amend his Complaint three times; a fourth amendment was denied prior to the District Court's consideration and ruling on NS's Motion to Dismiss Scott's Third Amended Complaint. Scott was then admonished by the District Court at the August 5, 1996 hearing on the Motion to Dismiss (Respondents' Appendix H) and again in the Court's order of August 14, 1996, to be clear and specific when amending his Title VII allegations for the fifth time. Scott filed his Fifth Amended Complaint on August 16, 1996.

Count I of the Fifth Amended Complaint (Respondents' Appendix D), omitted from Petitioner's Appendix, contains Title VII allegations of racial discrimination and Title VII allegations of retaliation for a previous EEOC same-gender sexual harassment charge and related lawsuits. Paragraphs 8 through 32 contain extensive details about Scott's racial discrimination complaints, starting with his hiring in August 1985, continuing through time-barred promotion, pay, and racial harassment allegations, then through more recent racial harassment claims, and leading up to his alleged racially motivated termination on February 16, 1996. These paragraphs focus exclusively (and repetitively) on actions that NS took "because of his race." No allegations are made of the harassment or the termination being "retaliatory"; no mention is made of Scott's proposed February 1996 transfer from Norfolk, Virginia to Decatur, Illinois.

In stark contrast, paragraphs 33 and 34 contain the details of Scott's retaliation claim. In those two paragraphs, Scott complains that his proposed February 1996 transfer from Norfolk to Decatur was in retaliation for his earlier same-gender sexual harassment EEOC complaint. He made no allegation that the transfer was "racially motivated."

During the course of discovery, Scott began to claim that everything was both racial and retaliatory. These clams went beyond the allegations of the Fifth Amended Complaint, and NS therefore included the issue of the scope of the Fifth Amended Complaint for the District Court's consideration as part of NS's summary judgment motion. The District Court ruled that Scott was limited to the discharge and transfer allegations of his Fifth Amended Complaint: (1) a racial, not retaliatory, discharge, and (2) a retaliatory, not racial, transfer. (Respondents' Appendix I). While Scott did attach his EEOC charge (but not his EEOC affidavit) to his Fifth Amended Complaint, this attachment, with its own vague descriptions of his complaints made to the EEOC, did not satisfy the District Court's order that Scott

clearly specify his Title VII allegations in his Fifth Amended Complaint. Moreover, the general allegations in the EEOC charge - "harassed, transferred, and terminated because of my race . . . and in retaliation" - were factually fleshed out by the detailed allegations in paragraphs 8-32 and paragraphs 33-34 of the Fifth Amended Complaint.[7] The District Court had discretion and authority to control the pleadings, claims, and evidence before it, particularly in a circumstance where four amendments had been permitted and where plaintiff had been instructed to be clear and specific. The District Court did not err in limiting Scott's claims to a racially motivated discharge and retaliatory transfer

## V. Scott's Petition Lacks Merit Under Supreme Court Rule 10.

Under this Court's rules, Scott's Petition for a Writ of Certiorari lacks merit. See Sup. Ct. R. 10. It addresses no conflict on an important matter between two or more circuits; no conflict between an important federal question and decision of a state court of last resort; nor exhibited a departure from the accepted and usual course of judicial proceedings. It speaks to no conflict on an important federal question between a state court of last resort and a decision of another state court of last resort or of a United States Court of Appeals. Nor does it bear on an important question of federal law that has not been, but should be, settled by this Court, or one which is in conflict with relevant decisions of this Court. Id. Petitioner apparently claims that the District Court's perceived failure to accord an "experienced pro se litigator" all of the pleading latitude called for in Haines v.

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[7]In any event, Petitioner has no claim based upon the transfer from Norfolk to Decatur because the transfer was cancelled; Scott suffered no "adverse employment action." Hale v. Marsh, 808 F.2d 616, 619 (7th Cir. 1986); Foster v. Township of Hillside, 780 F. Supp. 1026 (D.N.J. 1992); Hammil v. Banque Paribas, 780 F. Supp. 196 (S.D.N.Y. 1991).

Kerner, and the District Court's alleged failure to consider general EEOC charge allegations over the specific factual allegations of either the Third or Fifth Amended Complaints somehow creates a conflict with this Court's decisions. As discussed above, Petitioner's claims merely invite speculation by this Court. No compelling reason exists to burden this Court's docket with a matter wholly confined to a grievance which impacts only a single individual. This Court has stated:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Wells Work, Inc., 261 U.S. 387, 393 (1923). As in Layne & Bowler Corp., "[t]he present case certainly comes under neither head." Id.

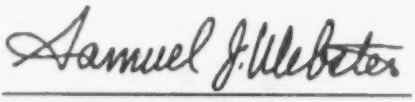
Petitioner pins his entire argument on the general allegations of his EEOC charge. Standing alone, they are insufficient as a matter of law to support any claim because they are totally devoid of any factual allegations. Therefore, consistent with Federal Civil Rule 10(c), these general allegations were read by the District Court in the context of Petitioner's specific factual allegations in both the Third and Fifth Amended Complaints.

## CONCLUSION

For the foregoing reasons, Respondents, Norfolk Southern Corporation, et. al, respectfully request this Court to deny the Petition for Writ of Certiorari. The liberality accorded to pro se pleadings may not be used to compel a

District Court to ignore the voluminous, detailed, factual allegations in a complaint. Neither the District Court nor the Fourth Circuit Court of Appeals ignored this Court's holdings concerning pro se pleadings; rather, the District Court, affirmed by the Fourth Circuit, construed plaintiff's pleadings as a whole and particularly examined the very detailed pleadings contained in the body of the Third Amended Complaint and Fifth Amended Complaint. Therefore, respondents, respectfully request that Scott's Petition for Writ of Certiorari be denied.

NORFOLK SOUTHERN CORPORATION
DAVID R. GOODE, et al



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